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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

NO. 652

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner

v.

R. H. BOULIGNY, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether an unincorported association with members who are citizens of the state in which an action is instituted, and in which the plaintiff is incorporated, may remove such action to the United States District Court on the basis of its bare allegation that it is a labor organization and a citizen of another state where its principal place of business is located.

2. May an unincorporated association, whether a juridical person or not, acquire the status of a citizen of a state within the meaning of Article III, Section 2 of the United

States Constitution, and 28 U.S.C. Sec. 1332 (a)(1), solely by reason of having a principal place of business in a state?

STATEMENT OF THE CASE

This case is one of two companion cases filed at the same time in the state court and removed by petitioner, United Steelworkers of America ("the Union") to the United States District Court. The other case is White v. United Steelworkers of America, cited at page 15 of the Union's brief. Respondent R. H. Bouligny, Inc. (Bouligny) in its complaint stated a cause of action for libel, alleging that the Union had falsely accused it of certain scandalous conduct in a widely circulated Union newspaper. White, the plaintiff in the companion case, in his complaint stated a cause of action for libel, alleging that the Union published in the same Union newspaper, a defamatory and suggestive cartoon caricature picturing him in the bowl of a commode. The plaintiff White, an employee of Bouligny, and the Union consented to an order of the District Court that the jurisdictional disposition of the White case would abide by the decision in this case.

The Union offered no affidavits or other evidence in the District Court to prove its assertions that it is a juridical person and a citizen of the State of Pennsylvania. No evidence was offered as to how the Union is organized and how it operates. The Union offered no evidence in proof of its allegation that its Pennsylvania office is its "principal office," nor does the record contain any evidence to which the Court might apply legal standards to determine whether the Pennsylvania office is its principal office or its place of domicile.

The Union claims to be a citizen of Pennsylvania, but does not claim its status as a citizen and a separate legal

personality pursuant to any law of the State of Pennsylvania, nor does it claim a formal organization in that State. The sole basis for the Steelworkers' contention that it is a citizen of Pennsylvania is that its principal place of business is located there. The Union contends that certain acts of Congress have conferred upon it a separate legal personality but does not contend that any law has conferred upon it a citizenship in the State of Pennsylvania. The Union has not claimed or proven that any of its members are citizens of Pennsylvania. Bouligny introduced proof that the Union has many members who are citizens of North Carolina (R. 9, 10), which has not been rebutted by the Union.

The United States District Court found "the ultimate facts to be that members of the defendant unincorporated association are citizens of North Carolina. . . ." (R. p. 7). The District Court then held that the Union is a citizen of Pennsylvania and that it had diversity jurisdiction. The Fourth Circuit Court of Appeals on appeal held that the Union is not a citizen of Pennsylvania.

SUMMARY OF ARGUMENT

The Union to succeed in its purpose herein must establish: that an unincorporated association may be a juridical person for diversity jurisdiction purposes; that an unincorporated labor union is impliedly made a juridical person for such purpose by labor legislation enacted by Congress; that a juridical person, not otherwise being a citizen of a state within the meaning of Article III of the United States Constitution and 28 U.S.C. Sec. 1332 (a)(1), becomes such a citizen by the establishment of a principal office in a state; and that the bare allegation that a labor union has a principal place of business in a certain state satisfies the diversity jurisdictional requirements of the United States

Constitution and statutes. The cases decided by this Court establish that this result is not permitted by Article III of the United States Constitution, nor by the diversity of citizenship statute.

I.

The United States Constitution, Article III, Section 2 (1) and 28 U.S.C. Sec. 1332 (a)(1) provide for federal jurisdiction when the controversy is between "citizens of different states." Since the adoption of the Constitution these words have been construed by this Court to exclude unincorporated associations as juridical entities. *Thomas v. Ohio State Univ. Trustees,* 195 U.S. 207 (1904); *Great Southern Fireproof Hotel Co. v. Jones,* 177 U.S. 449 (1900); *Chapman v. Barney,* 129 U.S. 677 (1889); *Lafayette Ins. Co. v. French,* 59 U.S. 404 (1856). Some of the unincorporated associations considered in those cases bore a closer resemblance to corporations than the Union in this case. However, this Court in *Great Southern Fireproof Hotel Co. v. Jones,* declared that "this Court does not hold that either a voluntary association of persons, or an association into a body politic created by law, is a citizen of a state within the meaning of the Constitution."

A particularly weak point for the Union in its quest for citizenship in the State of Pennsylvania is its contention that it is a citizen there because its principal place of business is located there. A number of the unincorporated associations held by this Court not to be citizens of a state had a more substantial connection with the state of the alleged citizenship by reason of being organized pursuant to the statutes of the state. The Union has not alleged any such connection with the State of Pennsylvania. A case in point is *Bankers Trust Co. v. Texas & P.R. Co.,* 241 U.S. 295 (1916), where this Court held that the Constitution

did not permit a corporation created under a federal statute to be a citizen of the state where its principal place of business and its principal operating and general offices were located and where it alleged it was a resident and inhabitant.

The Union claims to be a separate entity by reason of burdens imposed upon it by the Labor-Management Relations Act and the Labor-Management Reporting and Disclosure Act. However, it does not appear that Congress intended to charter a separate entity.

The Union contends that *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933) is authority for altering the diversity of citizenship rule so as to treat unincorporated associations like corporations. This case is wholly distinguishable and evinces no conscious intention to expand diversity jurisdiction. *Puerto Rico* was decided under the Organic Act of Puerto Rico which Congress enacted pursuant to the authority found in Article IV of the United States Constitution. This Court in *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922) distinguished the United States District Court for Puerto Rico from those created pursuant to Article III of the Constitution. This Court in the *Puerto Rico* opinion wholly distinguished the above-cited controlling decisions in this case by means of the distinction between the civil law of Puerto Rico and the common law of the United States. The *Puerto Rico* case held that the sociedad involved there had a domicile in Puerto Rico and therefore federal jurisdiction under the Organic Act was lacking. That case did not hold that the sociedad was, or even might be a citizen of Puerto Rico, and certainly did not hold or intimate that it might be a citizen of any state of the United States by any construction of Article III of the United States Constitution. The rule of the *Puerto Rico* case seems to be that an association must have as complete

a personality as the one permitted the sociedad by the civil law and statutes of Puerto Rico, but not by the common law of the United States, before it might even have a domicile of its own. The *Puerto Rico* decision is no authority for the Union in its claim to be a citizen of the state of its principal place of business, since this point was not involved in the *Puerto Rico* decision. The United States Courts of Appeals in the great majority of cases decided since *Puerto Rico* have not thought that case authorized a change in the diversity of citizenship rule as applied to unincorporated associations in the United States, and this Court has consistently denied petitions for certiorari in these cases, including the ones involving labor unions.

The Union is not treated as a juridical person even in the State of Pennsylvania where it claims to be a citizen. 12 *Pennsylvania Rules of Civil Procedure*, Rule 2152, requires that unincorporated associations sue by trustees ad litem.

II.

The Union's goal of expansion of diversity jurisdiction by means of vesting unincorporated associations with corporate status is opposed by the modern philosophy that diversity jurisdiction should not be expanded. This philosophy is supported by sound reasons: that the fears of local hostilities, which never had more than speculative existence, are even less real today; that the jurisdiction of the federal courts in general will continue to expand in response to the general growth of federal political power, and the federal courts will need to be relieved of business that intrinsically belongs to the state courts; that the state legislative and state judicial power should be co-extensive; and federal courts cannot exercise the creative function essential to their dignity and prestige in the diversity of citizenship area.

Unincorporated associations are so varied in organization and structure that distinguishing between those associations to be accorded citizenship and those not to would of itself be troublesome and productive of much wasted effort in the federal courts; and probably would result in many cases being litigated in the federal courts in the absence of federal jurisdiction, contrary to the intent of the Constitution. Problems of this sort were foreseen and stated by this Court in *Thomas v. Ohio State Univ. Trustees, supra.*

There is less reason to expand diversity jurisdiction for the benefit of labor unions than for other types of unincorporated associations. Unions do not encounter geographic hostilities, since the working people in any area, who are in the majority, are likely to be pro-union. The hostilities between labor and management can be expected to exist everywhere, and particularly in the state where the union engages in most of its activities. Also Congress has left certain labor problems as exclusively matters of state jurisdiction, and if these were brought into the federal courts, which would not have the creative function, by means of diversity jurisdiction, the law in this area would be left to be shaped by a small and unrepresentative body of state cases. The Union has not demonstrated that the state courts are unable to handle the labor litigation which Congress has left to them.

The Union complains that as the law now stands that plaintiffs in lawsuits in which the unions are defendants have greater power to select the forum; however, plaintiffs have always had more power than defendants to select the forum, and a different decision in this case would not change that.

A change in the diversity of citizenship status of unincorporated associations should not be judicially accom-

plished. This is more appropriately a matter for the legislature.

III.

The phrase "citizens of different states" used in Article III of the Constitution and in 28 U.S.C. Sec. 1332 has been uniformly construed by this Court for almost two centuries so as to exclude unincorporated associations. Even in the light of the various decisions of this Court which the Union relies upon, Congress has not amended the statute to change the rule as to unincorporated associations. This Court's construction of the diversity of citizenship statute has become as much a part of its meaning as though specifically written into it. Congress assumed this to be the meaning of the statute when it enacted certain other legislation. See 28 U.S.C. Secs. 1332 (c), 1391 and 29 U.S.C. Sec. 185. Had Congress intended for unincorporated labor unions to have available diversity of citizenship jurisdiction as entities, it would have expressly so provided. To change the rule judicially now would upset the legislative schemes of Congress.

IV.

The United States Court of Appeals for the Fourth Circuit properly analyzed the decisions of this Court to hold that unincorporated associations cannot be citizens within the meaning of Article III of the Constitution. The Court of Appeals properly concluded that *Puerto Rico v. Russell & Co., supra,* did not change this rule and properly held that the Union is not a citizen of the State of Pennsylvania.

ARGUMENT

"That a limited partnership association created under the Pennsylvania statutes may be described as a 'quasi corporation,' having some of the characteristics of a corporation, or as a 'new artificial person,' is not a sufficient reason for regarding it as a corporation within

the jurisdictional rule heretofore adverted to. That rule must be extended." *Great Southern Fireproof Hotel Co. v. Jones*, 177 U.S. 449 (1900).

The Union to prevail in this case must establish: that an unincorporated association may be a juridical person, like a corporation, for the diversity jurisdiction purpose of being a citizen of a state; that an unincorporated labor union is impliedly made a juridical person for such purpose by labor legislation enacted by Congress; that a juridical person, not otherwise being a citizen of a state within the meaning of Article III of the United States Constitution and 28 U.S.C. Sec. 1332 (a)(1), becomes such a citizen by the establishment of a principal office in a state; and that the bare allegation that a labor union has its principal office in a certain state satisfies the diversity jurisdictional requirements of the United States Constitution and statutes.

The burden of Bouligny's argument will be that those propositions are not established by the decisions of this Court and ought not to be recognized in this case.

I. The Union Does Not Qualify For Article III Citizenship.

The United States Constitution, Article III, Sec. 2 (1) provides that "the judicial power shall extend . . . to controversies . . . between citizens of different states." Congress may grant all or only part of this jurisdiction to the lower federal courts. *Glidden v. Zdanok*, 370 U.S. 530 (1962). Congress, choosing to make the grant in the very words of the Constitution, has said "the District Court shall have original jurisdiction of all civil actions where the matter in controversy . . . is between (1) citizens of different states." 28 U.S.C. 1332 (a)(1). In the nearly two hundred years since the adoption of the Constitution, this Court has uniformly interpreted these words so as to

exclude unincorporated associations as citizens of states. These decisions apply with force to this Union which is particularly ill-qualified for citizenship, and especially so in comparison to associations which have already failed in the quest for this status.

A. The Controlling Decisions Deny Citizenship to the Union.

This Court in repeated decisions has firmly established the rule that unincorporated associations are neither juridical persons nor citizens for purposes of diversity jurisdiction. *Thomas v. Ohio State Univ. Trustees,* 195 U.S. 207 (1904); *Great Southern Fireproof Hotel Co. v. Jones,* 177 U.S. 449 (1900); *Chapman v. Barney,* 129 U.S. 677 (1889); *Lafayette Ins. Co. v. French,* 59 U.S. 404 (1856).

This question was extensively considered in the *Great Southern Fireproof Hotel Co.* case, where an association was held by this Court not to be a citizen of Pennsylvania within the meaning of Article III of the United States Constitution despite its organization under the statutes of that State and its close resemblance to a corporation. The association derived its corporate appearance from an act of the General Assembly of Pennsylvania under which it was organized. This act provided that the capital subscribed would alone be responsible for the debts of the association. The Pennsylvania Constitution expressly included the association within the definition of "corporation" for the purpose of imposing certain restrictions. It was held that this provision was not intended to invest the association with all the attributes of corporations. The force of the decision rejecting the claim of diversity jurisdiction becomes apparent when it is considered that the Pennsylvania act itself provided that the association was a citizen of the State of Pennsylvania. This Court in that opinion expressly disagreed with the prior holding in

Andrews Bros. Co. v. Youngstown Coke Co., 86 F. 585 (6th Cir. 1898), that an association formed under the Pennsylvania statute was a citizen of Pennsylvania for the purposes of diversity jurisdiction. It appears from the *Andrews Bros. Co.* opinion of the Sixth Circuit that, in addition to the foregoing corporate characteristics with which the act endowed associations, the association, pursuant to the act, was: (1) governed by a board of managers, (2) empowered to sue and to be sued in the association's name, (3) authorized to hold and convey real estate in its own name, (4) authorized to distribute profits by means of dividends, provided such dividends did not impair capital; and (5) the interests of the members were freely transferable or assignable, though the assignee could not participate in the affairs of the association until elected to membership.

The Sixth Circuit in *Andrews Bros. Co.* reasoned that "in the last analysis, the only absolutely essential attribute of a corporation is the capacity to exist and act within the powers granted, as a legal entity, apart from the individuals who constitute the members." But this Court in *Great Southern Fireproof Hotel Co.* said that it was not willing to recognize "quasi corporations" or "new artificial persons," and that the diversity jurisdiction "rule must not be extended."

A joint stock association created pursuant to the statutory law of the State of New York was held not to qualify as a citizen of New York in *Chapman v. Barney, supra.*

The first case found in which this question of diversity jurisdiction was considered by the Court is *Lafayette Ins. Co. v. French, supra,* where the Court said:

> "This Court does not hold that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a state within the meaning of the Constitution."

The last case found in which this question was argued by counsel and considered by the Court is *Thomas v. Ohio State Univ. Trustees, supra,* where this Court said:

> "Here in the averment is only that the defendant Board of Trustees is a citizen of and domiciled in Ohio; not that the trustees themselves are citizens of that State. That averment alone is not sufficient."

The Board of Trustees in that case, like the Union in this case, argued that it was a legal entity, that its broad statutory powers made it so. This Court rejected that contention. The Board's contention that it was a citizen of Ohio because it was domiciled therein, which this Court also rejected, is at least equivalent to, or even more persuasive than, the Union's argument that it is a citizen of the State wherein is located its principal place of business.

This Court has never held for the purpose of establishing constitutional diversity jurisdiction that any type of organization, corporate or not, is a citizen of the state of its principal place of business. The Union apparently wishes to establish its citizenship in the State of its principal place of business by virtue of its similarity to the corporate form of organization. However, such a result would be contrary to the history and development of corporate diversity jurisdiction.[1]

In *Bank of U.S. v. Deveaux,* 9 U.S. 37 (1809), Chief Justice Marshall characterized a corporation as ". . . a mere creature of the law, invisible, intangible, incorporeal," and not a citizen for diversity purposes. This Court in *Louisville C. & C. R.R. v. Letson,* 43 U.S. 497 (1844)

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[1]The fiction of corporate citizenship has itself been intelligently criticized as an unwarranted expansion of federal diversity jurisdiction. See McGovney, *A Supreme Court Fiction,* 56 Harv. L. Rev. 853, 1090, 1225 (1943); Warren, *Corporations and Diversity of Citizenship,* 19 Va. L. Rev. 661 (1933).

held that: "When the corporation exercises its powers in the state which chartered it, that is its residence . . ." And that the corporation is to be "deemed" a citizen of that state for purposes of diversity jurisdiction. In *Marshall v. Baltimore & Ohio R.R.*, 57 U.S. 314 (1853), this Court held that a corporation cannot be a citizen, notwithstanding that the same result as in *Letson* was brought about by a conclusive presumption that all stockholders are citizens of the chartering state. The issuance of a state charter and formal organization pursuant to the state's statutory law are essential to citizenship by the reasoning in either case. An unincorporated association is not so easily deemed to be a citizen of the state in which is located its principal place of business, nor are its members so easily deemed to be citizens of that state. Article III of the United States Constitution would be stretched far beyond traditional judicial concepts in permitting an unincorporated association, not otherwise having the status of a citizen of a state, to acquire that status by locating a principal place of business in a state. Not even is this done by the 1958 amendment of 28 U.S.C. Section 1332 adding sub-section (c) which reads:

> "For the purposes of this Section, and Section 1441 of this Title, a corporation shall be deemed a citizen of any state by which it has been incorporated and of the state where it has its principal place of business."

Sub-section (c) was not enacted for the purpose of granting diversity jurisdiction, but for the purpose of withdrawing diversity jurisdiction which had theretofore existed in the state of the corporation's principal place of business. See H. Rep. No. 1706, 85th Cong. 2d Sess. (1958); 1 Cyclopedia of Federal Procedure, Sec. 2.284 (3d Ed. 1963 Cumu. Supp.). Sub-section (c) does not, therefore, raise the constitutional question of whether any

form of organization might be legislatively or judicially "deemed" a citizen of the state of its principal place of business for the purpose of making a grant of constitutional diversity jurisdiction.

Moreover, the word "deemed" used in sub-section (c) is itself something of an enigma. The legislative history of this sub-section given in Senate Report No. 1830 found in 1958 U.S. Code, Cong. & Adm. News, p. 3099, at page 3101, says:

> "It is now established doctrine that a corporation, for the purposes of jurisdiction, is deemed a citizen of the State in which it is incorporated (St. L. & S. F. Ry. Co. v. James, 161 U.S. 545, 16 S. Ct. 621, 40 L. Ed. 802 (1896)."

However, this Court in the *James* case did not revert to the doctrine of the *Letson* case, but plainly restated the doctrine that a corporation is presumed to be composed of citizens of the state which created it. The word "deemed" in 28 U.S.C. Sec. 1332 (c) would therefore mean "deemed" by this conclusive presumption, since it apparently was the intent of Congress to codify the doctrine of the *James* case. The use of the word "deemed" in conjunction with the state of the principal place of business is therefore not clear, and especially is this true when it is considered that this Court in *James* declined to modify the meaning of "citizen" in order to adopt the doctrine urged therein by counsel that a corporation domesticated in another state "shall be deemed to be composed of citizens of the second state. . . ." Ordinarily a person, either natural or juridical, could be expected to have only one state of citizenship. A person ordinarily is a citizen of the state where he is domiciled, and he has only one domicile. *Granite Trading Corp. v. Harris,* 80 F. 2d 174 (4th Cir. 1935). All the stockholders of a corporation could not at

once be presumed citizens of the incorporating state and also citizens of the state of the principal place of business since one would be inconsistent with the other. That a corporation might have two domiciles or two citizenships or that Congress intended this result also seems unlikely. The reasonable construction of sub-section (c) would seem to be that, in reality, a second citizenship is not created in the state of the principal place of business, but that this provision is no more than the withdrawal of a part of the jurisdiction of the United States District Courts by means of a paradoxical use of terms. A corporation would then be deemed a citizen of the state of its principal place of business only for the purpose of limiting federal diversity jurisdiction in that state. Thus sub-section (c) was an exercise of the congressional authority to withhold federal jurisdiction, not an affirmative grant of constitutional diversity citizenship.

B. Puerto Rico v. Russell Effected No Change.

The Union relies upon *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933) as authority for the claim to citizenship in the State of Pennsylvania. *Puerto Rico* is no authority for this.

In *Puerto Rico* suit was brought in the Insular District Court of San Juan, Puerto Rico, against Russell & Company, a sociedad en comandita organized under the laws of Puerto Rico, to recover assessments levied under an act of the Legislature of Puerto Rico. The individual members of the sociedad were not named as parties but appeared specially and removed the cause to the United States District Court for Puerto Rico. That District Court found it had jurisdiction under authority of Section 41 of the Organic Act (48 U.S.C.A. Sec. 863), which conferred "jurisdiction of all controversies where all of the parties

on either side of the controversy are citizens . . . of a foreign state or states, or citizens of a state, territory, or district of the United States *not domiciled in Porto Rico*. . . ." (emphasis added). The Court of Appeals for the First Circuit affirmed (60 F. 2d 10). This Court reversed and directed the District Court to remand the case to the Puerto Rican Insular Court.

In distinguishing *Puerto Rico* as authority for the Union's position, there is first of all an important distinction between the District Court involved there and the Article III United States District Courts. In *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922), this Court said of the Puerto Rico District Court:

> "The United States District Court is not a true United States court established under Article 3 of the Constitution to administer the judicial power of the United States therein conveyed. It is created by virtue of the sovereign congressional faculty, granted under Article 4, § 3, of that instrument, making all needful rules and regulations respecting the territory belonging to the United States. The resemblance of this jurisdiction to that of true United States courts, in offering an opportunity to non-residents of resorting to a tribunal not subject to local influence, does not change its character as a mere territorial court."

Article III is inapplicable to courts created in the territories outside the United States. See *Glidden v. Zdanok*, 370 U.S. 530 (1962). A construction of Article III or of the diversity statute therefore was not involved.

This Court in *Puerto Rico* apparently held that the sociedad had a domicile in Puerto Rico by reason of its relatively complete juridical personality under the Puerto Rican law which created it. The sociedad therefore failed

to meet the jurisdictional requirement of the Organic Act that it be "not domiciled in Porto Rico." This was not the equivalent of holding that the sociedad was a *citizen* of Puerto Rico. Domicile and citizenship are different things. *Wheeler v. Burgess,* 263 Ky. 693, 93 S.W. 2d 351 (1936). A citizen is one who is entitled to the privileges and immunities of the constitution and laws of a state or the nation as a member thereof. *Minor v. Happersett,* 88 U.S. 162 (1874). Domicile implies only the idea of a home or permanent residence. *Granite Trading Corp. v. Harris, supra.* Domicile does not necessarily imply citizenship in the case of juridical entities. *First Carolinas Joint Stock Land Bank v. New York Title and Mortgage Co.,* 59 F. 2d 350 (E.D.S.C. 1932). Consequently, the *Puerto Rico* decision furnishes no support for the Union's argument that an unincorporated association might be a citizen of a state for diversity jurisdiction. A further reason why this is true is found in the Organic Act requirement that "all of the parties on either side . . . are citizens . . . of a state . . . of the United States. . . ." The opinion observed "admittedly, if the individual members of the sociedad are 'parties' within the meaning of the Organic Act, Sec. 41, supra, the suit is one within the jurisdiction of the District Court because of their non residence. . . ." It would be surprising if an association organized and existing pursuant to the statutes of a political entity outside the United States were held to be a citizen of a state of the United States. And the *Puerto Rico* decision in particular furnishes no support for the Union upon the question of a citizenship being established by a principal place of business, since the sociedad was organized pursuant to Puerto Rican statutes and apparently existed solely in Puerto Rico, and the effect of the location of its principal place of business was not involved in the decision.

This Court found that the sociedad in *Puerto Rico* derived its juridical personality from two sources. The first source lay in the distinction between civil law and common law. The Court said that,

> "The tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnerships. Chapman v. Barney, supra; Great Southern Fireproof Hotel Co. v. Jones, supra. The tradition of the civil law, as expressed in the Code of Puerto Rico, is otherwise. Therefore, to call the Sociedad en comandita a limited partnership in common-law sense, as the respondent and others have done, is to invoke a false analogy."

It should not be overlooked that the opinion itself distinguishes the controlling decisions in this case by means of the distinction between the tradition of the civil law and the tradition of the common law. The second source was in the relatively complete powers and separate identity with which the sociedad was endowed by the Code of Puerto Rico under which it was created.

That *Puerto Rico* was not intended to overrule prior precedent can also be inferred from the fact that the *Puerto Rico* opinion cited with approval the case of *Levering & Garrigues Co. v. Morrin*, 61 F.2d 115 (2d Cir. 1932), aff'd, 289 U.S. 103 (1933) where the Second Circuit said at page 117:

> "Where federal jurisdiction is grounded on diverse citizenship, it must affirmatively appear in the pleadings or from facts clearly proven that diversity of citizenship exists between all the plaintiffs on the one hand and all the defendants on the other. . . . For this purpose the shareholders of a corporation are conclusively presumed to be citizens of the state in which it is incorporated,

and their citizenship is then attributed to the corporation. . . . The plaintiffs would have us apply a similar presumption as to unincorporated labor unions because under the doctrine of the Coronada case, 259 U.S. 344, 42 S. Ct. 570, 66 L. Ed. 965, 27 A.L.R. 762, they may be sued in the association name. This decision liberalized procedure in this respect but did not hold that jurisdiction was to be correspondingly extended. That an unincorporated labor union is suable as a legal entity implies nothing as to the citizenship of its members for purposes of federal jurisdiction. . . ."

The *Coronada* case is one of those relied upon by the Union (in its brief at pages 9, 34, 35) as establishing a new doctrine applicable to labor organizations for diversity purposes.

C. The Almost Universally Predominant View Since Puerto Rico v. Russell.

Since the *Puerto Rico* decision, in the vast majority of cases in which the questions involved herein have been considered, it has been held that unincorporated associations may not be citizens of a state within the meaning of Article III. See *Calagaz v. Calhoon*, 309 F. 2d 248 (5th Cir. 1962) (labor union); *Hanson v. Chicago B. & Q. R. Co.*, 282 F.2d 758 (7th Cir. 1960) cert. denied, 365 U.S. 850 (1961) (labor union); *Brocki v. American Express Co.*, 279 F.2d 785 (6th Cir. 1960); *Arbuthnot v. State Automobile Ins. Assn.*, 264 F.2d 260 (10th Cir. 1959); *Lowry v. International Brotherhood of Boiler Makers, Iron Ship Builders & Helpers of America*, 259 F.2d 568 (5th Cir. 1958) (labor union); *Underwood v. Maloney*, 256 F.2d 334 (3d Cir. 1958) cert. denied, 358 U.S. 864 (1958) (labor union); *Swan v. First Church of Christ, Scientist, in Boston*, 225 F.2d 745 (9th Cir. 1955); *Hettenbaugh v. Airline*

Pilots Assn. Internatl., 189 F.2d 319 (5th Cir. 1951) (labor union); *Steele v. Guaranty Trust Co. of New York*, 164 F.2d 387 (2d Cir. 1947) cert. denied, 33 U.S. 843 (1948).

Mason v. Express Co., 334 F.2d 392 (2d Cir. 1964) is the only clean departure from the rule established by the controlling decisions of this Court. The association involved in *Mason* was a New York joint stock association, organized under a New York statute, and was apparently about equal in the completeness of its separate identity to the one in *Andrews Bros. Co. v. Youngstown Coke Co., supra*. *Mason* is not authority for the position taken by the Union upon the second question presented. The association in *Mason*, being organized and existing under the statutes of New York, did not have to depend upon the location of its principal place of business to establish its citizenship in New York.

No case has been found prior to the *Mason* case which broke with the established rule sharply enough so that it could be said with any degree of certainty that such break had occurred. *American Federation of Musicians v. Stein*, 213 F.2d 679 (6th Cir. 1954) cert. denied, 348 U.S. 673 (1954), was not a break. The Court in that case held only that the district court had jurisdiction to issue an injunction preserving the status quo pending a determination of whether it had jurisdiction of the parties. In arriving at this holding, the Court considered that the district court might need time to weigh the authorities and make a determination as to whether the diversity jurisdiction rule might be changing. When the case went back to the District Court, the District Court held that the Union did not qualify as a citizen. *Stein v. American Federation of Musicians*, 183 F. Supp. 99 (M.D. Tenn. 1960).

The opinion in *Van Sant v. American Express Co.*, 169 F.2d 355 (3d Cir. 1947) is as much subject to the construction that it holds that the objection to diversity jurisdiction was made too late for the first time on rehearing of the appeal as it is to the interpretation that the joint stock association created under the statutes of New York is a citizen. The Court said at page 372:

> "The point involved, in our view, is not under the rule of Chapman v. Barney. . . ."

The Court in Footnote 7 on the same page seems to recognize the continuing validity of the *Chapman* rule, and the Court does not appear to think that it is departing from that rule. In *Swan v. First Church of Christ, Scientist, in Boston*, 225 F.2d 745 (9th Cir. 1955), the only question was whether the church was a corporation or not. The Ninth Circuit apparently had no doubts that the church was not a citizen if it was not a corporation. Also it is relevant that the Ninth Circuit said of *American Federation of Musicians* in a footnote at page 747:

> "We do not regard that case as a further application of the rule of Puerto Rico decision as the court merely sustained the trial court's retention of jurisdiction for the issuance of a preliminary injunction to preserve the status quo while the court 'after a hearing, after adequate study and reflection,' would have time 'properly to interpret and apply the law.' "

Stein, Van Sant, and *Swan,* like *Mason,* are no authority whatsoever for the Union upon the second question presented, as to whether the Union's principal place of business locates its citizenship. No authority has been found which supports the Union's position upon this question.

D. The Union In This Case Is No Exception.

The Union in its removal petition alleged as the sole basis for federal diversity jurisdiction that it is "a labor organization, existing under the laws of, and having its principal place of business in the State of Pennsylvania," and that it is "a citizen of the State of Pennsylvania." (R. pps. 4, 5) No proof in support of the allegations was offered when they were challenged by Bouligny's motion to remand. (R. p. 8) Jurisdictional facts must distinctly and positively appear in the record, or the District Court is presumed without jurisdiction; jurisdiction may not be inferred argumentatively or conferred by consent. *Thomas v. Ohio State Univ. Trustees, supra.* "The policy of the statute conferring diversity jurisdiction upon the District Courts calls for a strict construction. . . . Accordingly, if a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof. . . . The bill must be dismissed if the evidence in the record does not support the allegations. . . ." *Thompson v. Gaskill,* 315 U.S. 442 (1942). Examination of the record discloses that the Union has failed to carry its burden of proof.

1) The Union's bare allegation that it is a labor organization does not establish it as the equivalent of a corporation for diversity purposes.

The Union, in its brief, at pages 3, 4, 33 and 34, recites the District Court's "finding of fact" that the Union is a juridical person as completely as if organized as a corporation and contends that the Fourth Circuit did not disturb this "finding of fact." The Union introduced no evidence from which such a "fact" might have been found, but relied solely upon several acts of Congress imposing certain obligations upon labor unions and conferring cer-

tain immunities, and also upon two cases, *United Mine Workers v. Coronada Coal Co.*, 259 U.S. 344 (1922) and *United States v. White*, 322 U.S. 694 (1944). The finding then is not one of fact but one of law. The reversal by the Fourth Circuit amounts to a repudiation of this so-called finding of fact which is, in truth, not a finding of fact but a conclusion of law.

As has already been mentioned, the Second Circuit in *Levering & Garrigues Co.* did not consider that the *Coronada* case, which held a labor union suable as an entity, afforded any basis for saying that an unincorporated labor union might be a citizen for purposes of federal diversity jurisdiction. This view apparently was not disapproved in the *Puerto Rico* decision. The *White* case, holding that a labor union could not resist a subpoena by invoking the Fourth and Fifth Amendments, would seem to add little to the *Coronada* case in this respect.

The Union, in its brief at pages 36-38, cites the Labor-Management Relations Act and the Labor-Management Reporting and Disclosure Act in support of its contention that Congress has given labor organizations corporate-like personalities. However, as appears from an examination of the cited legislation, Congress did not intend to and did not charter a new form of corporation or corporate-like personality. The fundamental purpose of the legislation is to regulate the unions rather than to charter them as more complete separate identities. This is but a practical recognition by Congress that any large and influential organization, such as some unions are, might abuse its members and perhaps others with whom it deals unless it is regulated. Thus requiring every union to adopt and file a constitution and by-laws (29 U.S.C. Secs. 431 (a), 435 (a)) is not the equivalent of issuing a corporate charter and thereby chartering a new entity which had not theretofore existed.

The manner in which the State of Pennsylvania treats the Union as an unincorporated association would seem to be relevant to the Union's claim of a juridical personality for purposes of citizenship therein. *Pennsylvania Rules of Civil Procedure,* Title 12, has the following provisions in regard to unincorporated associations:

"Rule 2151. As used in this Chapter 'action' means any action or proceeding at law or in equity . . .;

'Association' means any unincorporated association conducting any business or engaging in any activity of any nature whether for profit or otherwise under a common name. . . .

Rule 2152. An action prosecuted by an association shall be prosecuted in the name of a member or members thereof as trustees ad litem for such association. An action so prosecuted shall be entitled 'X association by A and B, Trustees Ad Litem' against the party defendant.

Rule 2153 (a). In an action prosecuted against an association it shall be sufficient to name as defendant either the association by its name, whether the same is registered, filed or not, or any officer of the association as trustee ad litem for such association in the manner prescribed by Rule 2152.

(b) If a plaintiff prosecutes an action against an association in the association's name only, the association may prosecute any setoff, counter-claim or cross-action in its association name."

These rules are applied to unincorporated labor unions. *Highway Truck Drivers and Helpers v. Cohen,* 409 Pa. 546, 187 A 2d 291 (1963). Thus, the Union would not seem to be treated altogether as a juridical person in the state where it claims to be a citizen.

The tenor of the Union's argument is that it should now be treated as a citizen for diversity purposes, since it is now possible for it to have a more complete legal personality than was heretofore available to unincorporated associations. However, it has not demonstrated that it has a legal personality even as complete as those already considered by this Court in *Chapman v. Barney, supra; Great Southern Fireproof Hotel Co. v. Jones, supra;* and *Thomas v. Ohio State Univ. Trustees, supra.*

2) The Union's Bare Allegation that its principal place of business is in the State of Pennsylvania does not establish it as a citizen of that State for diversity purposes.

Even if it could be said that the labor acts organize the Union as a separate entity as complete as a corporation, still it would not be a citizen of a state within the meaning of Article III. "State citizenship does not result from the mere creation of a corporation under federal law." *Federal Intermediate Credit Bank of Columbia v. Mitchell,* 277 U.S. 213 (1928). And in *Bankers Trust Co. v. Texas & P. R. Co.,* 241 U.S. 295 (1916), this Court held that a corporation created under federal statutes could not be a citizen of Texas within the meaning of the Constitution, even though it had "its principal place of business and its principal operating and general offices in the Northern District of Texas," and alleged it was a "resident and inhabitant of that district." Nevertheless, the Union attempts to locate its state of citizenship by the bare allegation that its principal place of business is in the State of Pennsylvania. No other facts tending to prove either domicile or citizenship are alleged.

Far from being of assistance to the Union, the *Puerto Rico* case seems to hold that an association must have a

personality as complete as the one permitted the sociedad by the civil law and statutes of Puerto Rico, but not by the common law in the United States, before it may even have a domicile of its own as an entity; and then that domicile is located by the law which created it, not by the principal place of business.

The Union, not having proven that it is formally chartered as a corporation pursuant to state statutory authority, is not able to claim state citizenship. This result is not permitted by Article III of the United States Constitution.

II. Sound Policy Requires That The Union Be Denied Article III Citizenship.

The main stream of modern legal thought is that federal diversity jurisdiction should be more severely restricted rather than expanded. In Friendly, *Historic Basis of Diversity Jurisdiction,* 41 Harv. L. Rev. 483 (1928), the author reviews the history and development of federal diversity jurisdiction and soundly concludes at page 510:

> "The steady expansion of the jurisdiction of the federal courts, especially since reconstruction days, has been but a reflex of the general growth of federal political power. That growth will not abate, since it is responsive to deep social and economic causes. Only one aspect of the work of the federal courts is out of the current of these nationalizing forces — the jurisdiction based on diversity of citizenship. This has its origin in fears of local hostilities, which had only a speculative existence in 1789, and are still less real today. The unifying tendencies of America here make for a recession of jurisdiction to the states, rather than an extension of federal authority. The pressure of distinctively federal litigation may call for relief of business that intrinsically

belongs to the state courts. How far, if at all, the United States courts should be left with jurisdiction merely because the parties are citizens of different states is a question which calls for critical re-examination of the practical bases of diversity jurisdiction."

In the American Law Institute's "Study of the Division of Jurisdiction Between State and Federal Courts," Tentative Draft No. 1 (April 30, 1963), the general statement on diversity jurisdiction appearing at page 36 is as follows:

"There should be stated at the outset the firm premise of the Reporters that access to the federal courts because of the diversity of citizenship of the parties should be permitted only upon a showing of strong reasons therefor and only to the extent that these reasons justify. This premise is grounded upon the political axiom, advanced by Hamilton in Justification of the Federal Judicial Power, that judicial and legislative authority should be co-extensive. So long as federal courts continue to decide cases arising under state law without the possibility of state review, the state's judicial power is less extensive than its legislative power; this is an undesirable interference with state autonomy. It would be preferable to see the use of the federal courts concentrated upon the adjudication of rights created by federal substantive law. In such adjudication the federal courts speak with the authority which they lack in diversity cases since Erie R.R. v. Thompkins, 304 U.S. 64 (1938), and can thus exercise the creative function which is essential to their dignity and prestige."

The precedent which the Union seeks in this case would result in expansion of federal diversity jurisdiction contrary to the main current of modern legal thought.

The Union's argument that *Puerto Rico v. Russell, supra,* changed the diversity rule is further diluted by the fact that the decision in that case withholding federal jurisdiction is consonant with the policy of restricting federal jurisdiction based upon the citizenship of the parties, whereas the result urged by the Union in this case is opposed by that policy.

There are difficulties attendant upon granting diversity jurisdiction to some unincorporated associations because they have characteristics of an entity which were not present in the case of corporations. The corporate form of organization is well defined and universally recognizable, all being treated alike for diversity jurisdiction purposes; but associations can and do exist with an infinite variety of shades and combinations of corporate characteristics. If the concept of a citizen were expanded to include some unincorporated associations by reason of their characteristics as entities, each case would have to stand on its own bottom in its claim to citizenship, with attendant uncertainty and increased burden of litigation in the federal courts. The result would be a great many additional cases being removed to or filed in the federal courts, both where there is or where there is not determined to be federal jurisdiction. In each one of these cases, the Court would have to determine whether the association has sufficient characteristics of an entity to be a citizen. This situation would result in unnecessary and wasteful increased cost of operation of the federal courts due to the increased work load, in the federal courts being distracted from more important questions, and in the increased cost of litigation, wasted time and harassment to litigants.

This case is an example. It has been pending in the federal courts for two years without the federal jurisdiction question being finally determined. If the District Judge had

remanded as he should have under the controlling decisions, the case would have long ago been tried on its merits.

One effect would undoubtedly be that district judges would encounter increased difficulty in distinguishing citizens from non-citizens, resulting in increased numbers of cases being litigated in federal courts when there is no federal jurisdiction.

If the Union obtains the precedent it seeks hereby, district judges will likely find themselves in an unfamiliar quandary with increasing regularity. Unincorporated associations with some characteristics of an entity will find it easy to allege that they are juridical persons and citizens for the purpose of instituting litigation in or removing lawsuits to federal courts. The adverse party in many instances will not want to challenge the federal jurisdiction. The district judge will then be put to the election of trying the lawsuit when he suspects federal jurisdiction is lacking or of incurring the expense of money and time in carrying out his own investigation of the status of the party seeking federal jurisdiction.

Perhaps the worst result of all would be the divisions in the circuits likely to occur regarding the question of the dividing line between unincorporated associations to be judicially recognized as persons and those to be excluded from this status. Two circuits have in varying degrees displayed some predisposition to want to regard some unincorporated associations as the equivalent of corporations for diversity. See *Mason v. American Express Co.*, 334 F.2d 392 (2d Cir. 1964); *American Federation of Musicians v. Stein*, 213 F.2d 679 (6th Cir.) cert. denied, 348 U.S. 873 (1954); *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 F. 585 (6th Cir. 1898). The other circuits have

not manifested this predilection. The breakdown in the clear distinction between corporations and unincorporated associations would doubtless result in some circuits going much further in the recognition of unincorporated associations than others are willing to go, with corresponding confusion in the District Courts. The judicial task of reestablishing a clear line of distinction would be virtually impossible. One argument in favor of recognizing some unincorporated associations has been the vague and perhaps irrelevant one that justice requires greater equality of treatment between corporations and unincorporated associations; but this argument ignores the resulting even greater inequality of treatment among unincorporated associations which would occur, as well as ignoring the fundamental constitutional and statutory tests.

This Court in *Thomas v. Ohio State Univ. Trustees, supra,* declared its policy in denying citizenship to the Board of Trustees when it said,

> "A contrary ruling would, we apprehend, produce confusion and embarrassment in litigation relating to those public state institutions or agencies in Ohio which, according to the decision of its highest court, were not endowed, nor intended to be endowed, with corporate powers."

And similar conditions will be brought into existence if the Union succeeds in establishing the precedent it seeks in this case.

There may even be less reason to expand diversity jurisdiction for the benefit of labor unions than for the benefit of other types of unincorporated associations. The heat of conflict occasionally surrounding labor unions is generated by friction between different segments of society, rather than by different geographic regions. When such ill feeling

does exist, it is between labor and management and those in sympathy with one side or the other, rather than between geographic regions. Unions do not import labor into a geographic region but organize the labor which is already there. And labor disputes ordinarily occur in reality between residents of the same state — the employees on one hand and their employers on the other. It is unlikely that unions could validly claim to be injured by a widespread hostility among working people, since this is the group of which unions are composed. Instead of being injured in local litigations by this class hostility where it exists, the unions may be more often benefited, since local juries are more prone to be composed of representatives of the more numerous working people than of representatives of management groups. A philosophy of this nature was expressed by the author of a note, 38 Harv. L. Rev. 510 (1925) when he said at page 513:

> "But there are even more practical arguments against this extension of federal jurisdiction. In the first place, it seems that the state courts can, by and large, satisfactorily handle this labor litigation. The narrow state partisanship which was the original justification for any diversity of citizenship jurisdiction has quite disappeared. In the second place, the federal courts have a most important primary function in the constitutional adjustment of the multiple units of our type of government and their relations to the people. For this they need a lifting of the burdens of the kind of litigation which can be handled by other courts, rather than a crush of labor cases; they need the amity of state courts, which will not be improved by the ouster of further jurisdiction; and they need the unreserved confidence of all classes of the people, which may be shaken by their be-

coming the storm center for the unreasoning class feelings which always characterizes labor cases."

The author of that note is not alone in his feeling that labor cases are best left to the state courts. The author of a note in 39 N.Y. Univ. L. Rev. 1124 (1964) at page 1126 says the granting of citizenship in labor union cases "would have created serious inconsistencies in the statutory scheme for labor regulation." In explanation, it is said:

> "Certain labor problems are presently exclusively matters of state jurisdiction: when the NLRB actually declines jurisdiction, when the activity challenged is arguably not protected or prohibited by federal statutes, and when violence is involved. If diversity were allowed in these cases, states would lose control over them. Not only would this deprive states of established areas of control, it might result in a lessening of remedial efficacy, since in many cases federal courts would be unable to grant the same form of relief as state courts. This conflict with state jurisdiction over labor problems would arise often, whether a union were deemed a citizen of the state of its national office, or of its local; and courts, moreover, have little guidance in choosing between the alternatives."

And the author of the note further said of the type of diversity jurisdiction expansion urged by the Union:

> "Regardless of how each particular type of association is treated, application of the entity theory to determine the citizenship of unincorporated associations would probably result in liberal access to the federal courts, since many forms of business associations possess these characteristics which *Russell* and *Mason* considered essential. But this approach might well cause an unjustifi-

able expansion of diversity jurisdiction. The argument that the federal court is needed as a fair tribunal presumes that state courts will unfairly discriminate against out-of-state parties. This reasoning, prominent in the expansion of citizenship to include corporations, has become increasingly less justifiable. The possible exception is the treatment accorded labor unions and other social-action groups, but in the case of unions, Congress has indicated an intent that state courts be allowed the degree of control they now exercise. Some commentators note that since federal courts can only interpret, and not modify, state law, removal from the state courts of large classes of cases leaves state law to be shaped by a restricted and possibly unrepresentative body of cases. Also, the federal caseload is presently large and inclusion of many forms of unincorporated associations might make it unmanageable, and would arguably conflict with Congress' concern to limit federal jurisdiction for corporations. Similarly, there are disadvantages in expanding the federal judiciary to compensate for greater access to federal courts. Thus, it is questionable whether such a radical extension of federal jurisdiction is a matter for the courts. The American Law Institute has recommended that 'any association or partnership' able to sue and be sued in its common name be deemed a citizen for diversity purposes, but it proposes that this change be effected by legislation."

The policy reasons urged by the Union for a grant of diversity jurisdiction in this case have little force. The Union in its brief (pps. 15, 16) argues that the decision below is unfair "for it gives the plaintiff unprecedented power to determine the forum in which the case will be tried. If he wants to be in federal court, he will utilize the 'class action' device to create diversity jurisdiction. If, on

the other hand, he prefers to be in the state court, he need only sue the Union there as an entity, and, under the decisions of the court below, the Union will be powerless to remove." It is difficult to see why a different decision in this case would change this result. Under the reasoning cited by the Union in support of this argument, it would seem that even though the Union is regarded as a citizen of Pennsylvania, a local plaintiff in another state might name local union members as defendants in a class action and thereby defeat federal jurisdiction. Or the plaintiff might control the jurisdiction of the lawsuit by naming the union itself as an entity. Conversely, the Union when it is the plaintiff would be in a position to control jurisdiction in like manner by suing as an entity or as a class action or by selection of the state or forum in which to bring suit. As a practical matter, plaintiffs have always been and probably always will be in the best position to select both the jurisdiction and the venue of an action. Thus the plaintiff on a transitory cause of action might sue a defendant in any state in which the defendant can be served with process, and the defendant is not in a position to select the state in which he would most prefer to defend. If the action is brought in the United States District Court, the defendant may change the venue only in the discretion of the Court and for the most narrowly defined reasons. 28 U.S.C. Secs. 1391, 1401. If the action is in a state court, the defendant may not remove it to another state. And he may ordinarily change the venue within a state only with difficulty and for narrowly defined reasons. See *Brendle v. Stafford,* 246 N.C. 218, 97 S.E. 2d 843 (1957).

The Union in the appendix to its brief attaches certain matter apparently published by management in various labor disputes in an effort to impute the sentiments of one

side of the dispute to an entire geographic region. The libelous publications which are the basis of Bouligny's action and White's action are an indication of the fact that scurrilous publications are not all confined to the management side. Labor disputes are not confined to the southeastern part of the United States, as the appendix to the Union's brief might insinuate; and common law tortious activity between residents of the same state would be among the most common causes removed to the federal courts pursuant to the precedent the Union seeks. The Union has not established that state courts are inadequate to handle problems arising under state law in these areas.

If the Union succeeds in establishing the precedent it seeks herein, based upon a holding that the labor acts of Congress have re-created the Union as a juridical person by means of the burdens imposed and privileges conferred, a new federal jurisdictional door will open for the unions which Congress never intended. It has long been "the general rule that district courts have jurisdiction of suits brought by or against corporations organized under an act of Congress on the ground that they are controversies arising under federal law." *Federal Intermediate Credit Bank of Columbia v. Mitchell, supra.* Congress enacted 28 U.S.C.A. Sec. 1349 in 1948 to counteract the effect of this rule by providing "the district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an act of Congress, unless the United States is the owner of more than one-half of the capital stock." If unincorporated associations which have certain characteristics of an entity are to be treated as indistinguishable from corporations for the purpose of obtaining federal diversity jurisdiction by reason of the powers conferred by federal acts, it would be difficult to distinguish them from corporations

created under federal acts for the purpose of attaining federal question jurisdiction. But this result would serve to defeat the intent of Congress, since the limitation of 28 U.S.C.A. Sec. 1349 does not specifically apply to unincorporated associations.

This ripe new field for litigation would serve only to swell the flood of litigants seeking juridical entity diversity jurisdiction and further overburden the already overburdened federal courts.

The above quoted excerpts make it apparent that the legal writers are anxious that the quality and effectiveness of the federal courts not be impaired by a flood of diversity cases. This would be the inevitable result of establishing the precedent which the Union seeks.

The enormous number of cases annotated under 28 U.S.C.A. Secs. 1331, 1332 and 1441 lead to the conclusion that there is no dearth of litigants to seek the new type of federal jurisdiction. They await only some word of encouragement from this Court.

III. The Diversity Statute Is Not Subject To Enlargement By Construction To Include The Union As A Citizen For Diversity Purposes.

The diversity of citizenship statute grants jurisdiction to the district courts in all controversies between, in the words of Article III of the Constitution, "citizens of different states." Those words of the Constitution have been uniformly construed by this Court so as to exclude unincorporated associations even though they might be separate identities, quasi corporations, or new artificial persons. *Great Southern Fireproof Hotel Co. v. Jones, supra.* In the light of the construction given these words since the inception of the United States, Congress has not seen fit to

amend the diversity statute to provide otherwise. Congress amended this statute in 1958 (28 U.S.C.A. Sec. 1332 (c)) to make express provision for corporations and to decrease the federal diversity jurisdiction theretofore existing as to corporations. In the face of the historic and continuing construction of this statute by this Court and in the light of the decision in *Puerto Rico v. Russell & Co., supra,* Congress nevertheless made no provision for unincorporated associations. This construction of the diversity of citizenship statute has by uninterrupted and unmodified long standing become as much a part of the statute as if expressly and specifically written into it. This construction of the statute has obviously been assumed to be the meaning of it in other legislation enacted by Congress.

The 1958 amendment of the general venue statute (28 U.S.C. Sec. 1391 (c)) provides that a corporation may be sued in any district in which it is incorporated, or licensed to do business, or is doing business. The venue statute is silent as to unincorporated associations. It is apparent therefrom that the legislative scheme presumes that as to unincorporated associations the historic rule will control.

Congress made provision for the jurisdiction and venue of certain actions by or against labor unions in 29 U.S.C. Sec. 185, when unions are sued or sue for violation of contracts between an employer and a labor organization. In such instances, the venue is established "(1) In the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members." It is unlikely that Congress would have thought it necessary to provide such venue, unless Congress believed that 29 U.S.C. Sec. 185 created in a very limited way for the first time a new federal question

jurisdiction for unincorporated labor unions. The new venue was created to correspond to the new limited jurisdiction in the absence of any other venue for unions. These venue provisions might not be appropriate for general diversity jurisdiction litigation involving unions as citizens of states.

Congress obviously omitted any provision for unincorporated associations from 28 U.S.C. § 1332 and 1391 because it was assumed there would be no change in the diversity rule. To change the diversity of citizenship rule in the manner urged by the Union would upset legislative schemes Congress has enacted in its long reliance upon the historic diversity rule.

The American Law Institute has undertaken a study of the division of jurisdiction between state and federal courts and has published two tentative drafts. Diversity jurisdiction as applied to unincorporated associations is a part of the study. See Tentative Draft No. 2, Section 1301 (b)(2) (1964). This effort may result in Congressional reconsideration of the diversity jurisdiction rule. If the law is to be changed at all, it should be changed legislatively and not judicially. And perhaps it ought not to be changed at all in the absence of a constitutional amendment.

IV. The Court Of Appeals Opinion Is Correct And Achieved The Proper Result.

The Fourth Circuit cited as controlling precedent the rule stated in *Great Southern Fireproof Hotel Co. v. Jones, supra:*

> "This Court does not hold that either a voluntary association of persons, or an association into a body [fol. 36] politic created by law, is a citizen of a state within the meaning of the Constitution."

* * *

> "But the Express Company cannot be a citizen of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation."

The Fourth Circuit noted that *United Mine Workers v. Coronada Coal Co., supra,* expressly said that permitting unions to be sued in the union name is merely a procedural matter, not a matter of substantive law. Sections 41 and 42 of the Organic Act of Puerto Rico, now 48 U.S.C.A. Secs. 863, 864, were pointed out as the basis of this Court's decision in *Puerto Rico v. Russell & Co., supra.* It was pointed out that the *Puerto Rico* opinion expressly held that diversity of citizenship was not involved in the decision. The Fourth Circuit correctly concluded that the *Puerto Rico* decision was not consciously intended to expand federal diversity jurisdiction. The Circuit Court concluded that 28 U.S.C. Sec. 1332 is no longer subject to a construction permitting the inclusion of unincorporated associations as citizens, and based thereon and on constitutional precedent, correctly reversed the District Court's holding that the Union is a juridical person with its principal place of business and citizenship in the State of Pennsylvania.

CONCLUSION

Bouligny is a citizen of North Carolina. The Union is not a citizen of Pennsylvania, but is an unincorporated association with members who are citizens of North Carolina. Accordingly, there is no diversity of citizenship. The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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